Supreme Court, U.S.

No. _____ 98 765 NOV 10 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted under the federal mail and wire fraud statutes for failing to disclose certain information despite having no duty to disclose that information.

2. Whether a district court may preclude a defendant from impeaching a witness' testimony with extrinsic tape-recorded evidence of a prior inconsistent statement after the witness admits to making the inconsistent statement.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the District Court and the Court of Appeals for the Third Circuit were the United States of America and Milton Sonneberg ("Petitioner").

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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Petitioner Milton Sonneberg respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Third Circuit, entered on August 12, 1998, which affirmed Petitioner's judgment of conviction.

OPINION BELOW

The Order (per Greenberg, J., Scirica, J. and McKee, J.) of the Court of Appeals for the Third Circuit is not published in the Federal Reporter. It is reprinted in the Appendix to this petition, *infra*, A1.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit (the "Third Circuit"), of which review is sought, was entered on August 12, 1998. That decision affirmed the judgment of conviction entered in the United States District Court for the District of New Jersey (the "District Court"). The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTES AND RULE

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed.R.Evid. 613 Prior Statements of Witnesses

(a) Examining witness concerning prior statements. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

18 U.S.C. §1341 Fraud and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial

interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1343 Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This petition for a writ of certiorari challenges Petitioner's conviction on two separate grounds, both of which independently require reversal of all counts for which he was convicted. Each ground presents an issue that has created a split in the federal courts of appeals that have considered it, and the grant of certiorari in this case will allow

the Court to definitively rule on two significant aspects of the criminal law.

The first issue concerns a simple question of law: whether a defendant may be convicted under the federal mail and wire fraud statutes for failing to disclose certain information despite having no duty to disclose that information. This Court, having ruled in *Chiarella v. United States*, 445 U.S. 222 (1980), that a securities fraud conviction for nondisclosure cannot survive in the absence of such a duty, must now decide whether the mail and wire fraud statutes have the same requirement.

In this case, Petitioner worked as a telemarketer, selling ownership interests in wireless cable television stations and radio stations to customers over the telephone. The government argued to the District Court that Petitioner's failure to inform investors that he had previously pleaded guilty to securities fraud violated the mail and wire fraud statutes, irrespective of whether he had a duty to disclose such information. The District Court agreed, finding that the mail and wire fraud statutes require individuals to disclose *all* material information, even if the defendant had no duty to disclose it. As a result, it permitted the jury to convict Petitioner on a legal theory that has been flatly rejected by other appellate courts. Both the Tenth and Eleventh Circuits have recognized that a defendant's failure to disclose information cannot be criminal absent a duty to disclose. These Courts have recognized that *Chiarella* -- which found in the securities fraud context that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak" -- applies with equal force to the mail and wire fraud statutes. 445 U.S. at 235. The Third Circuit affirmed Petitioner's conviction, implicitly adopting the

District Court's contrary finding that *Chiarella* applies only to securities cases and that the mail and wire fraud statutes do not require the government to prove the existence of a duty to disclose. Because *Chiarella* is not so limited, and because Petitioner was convicted of a crime that does not exist, this Court must grant certiorari to review his conviction.

This Court's resolution of this question will do more than resolve a split among the Third, Seventh, Tenth and Eleventh Circuits; it will have far-reaching effects on the securities industry and will determine whether a wide variety of trading and other commercial activities are criminal. The decisions below have expanded the mail and wire fraud statutes to criminalize an unprecedented breadth of conduct, including activity that was otherwise permissible under the applicable securities statutes.[1] Under the District Court's holding, individuals employed in the securities industry may no longer look to the securities statutes that regulate disclosure, but instead must divine that their failure to disclose information later found to be material could result in a mail or wire fraud prosecution. Furthermore, review would allow the Court to redress an affront to the fundamental notion of due process that an individual must have notice of the crime of which he is convicted. Here, no case or statute could have given Petitioner any meaningful notice that his failure to alert his customers of his prior legal troubles could be criminal.

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[1] The securities law statutes limit those who must disclose prior criminal activity to individuals who hold significant positions within the offering company, not to telemarketers such as Petitioner. *See* 17 C.F.R. § 229.401(f); Schedule 14A, 17 C.F.R. § 240.14a-101.

Second, Petitioner's conviction should be reversed because the District Court made an erroneous evidentiary ruling that prevented Petitioner from presenting to the jury the most compelling evidence of his innocence: tape-recorded statements of the government's star witnesses describing their intention to perjure themselves at Petitioner's trial by falsely inculpating him. These witnesses initially testified that they did not make such statements, but grudgingly acknowledged making them on cross-examination after being confronted with written excerpts from the transcripts of the tape recordings. The witnesses minimized the impact of their admissions, however, by claiming that they were "only joking" and that they were "in denial" when they made the statements. Rather than permit Petitioner to play the tapes to the jury so it could determine for itself the witnesses' intent in making the statements, the District Court ruled that the witnesses' half-hearted admissions to the statements made the introduction of the tapes cumulative. This ruling deprived Petitioner of the opportunity to confront these witnesses with the best evidence of their inconsistent statements. Moreover, by not permitting Petitioner to play the tapes for the jury, the court allowed the witnesses to downplay the significance of the statements without fear of any meaningful impeachment. This Court now has the opportunity to rule on this issue, correct an injustice, and resolve an important evidentiary issue that has created a distinct split in the circuit courts of appeals.

INDICTMENT AND PRIOR JUDICIAL PROCEEDINGS

1. Petitioner was convicted by a jury in the District Court of New Jersey on a thirty-count indictment based upon his participation in the promotion and sale of ownership interests in wireless cable television systems and radio

stations. The indictment charged Petitioner with conspiracy, mail fraud, wire fraud and the interstate transportation of money obtained through fraud. The thrust of the indictment and the government's presentation at trial was that Petitioner defrauded his customers by failing to disclose to them that he had previously pleaded guilty to securities fraud. The indictment stated: "It was a principal object of the conspiracy . . . to omit and fail to make disclosures of material information to the investing public . . .regarding . . . the true backgrounds of the persons promoting and offering the investments." In presenting this theory to the jury, the government argued that Petitioner should be convicted, apart from any other alleged misconduct, for failing to disclose his guilty plea.

Prior to trial, Petitioner moved to strike as surplusage all references to his plea. The court denied the motion, finding that "the references in the indictment to the prior criminal convictions and civil fraud injunctions against defendants are not only relevant, but actually constitute the alleged misrepresentations which caused the conspiracy to defraud. *S.E.C. v. Holschuh*, 694 F.2d 130 (7th Cir. 1982); *S.E.C. v. Technical Resources, Inc.*, 1997 WL 1066 (S.D.N.Y. Dec. 22, 1977); and *S.E.C. v. Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983), *aff'd sub nom., S.E.C. v. Cayman Islands Reins. Corp.*, 734 F.2d 118 (2d Cir. 1984)." (The Opinion is reprinted in the Appendix to this Petition, *infra*, A3). The cases upon which the court relied, however, all involved individuals who violated an explicit regulatory requirement that officers, directors and senior management of publicly held companies must disclose their prior convictions under certain circumstances in certain documents. *See e.g.*, 17 C.F.R. § 229.401(f); Schedule 14A, 17 C.F.R. § 240.14a-101. Here, by contrast, there was no such express statutory

requirement. The court nonetheless applied these cases, ruling that the "broad" mail and wire fraud statutes require defendants to disclose all material information, regardless of whether a duty to disclose is present. Subsequent to this ruling, Petitioner repeatedly objected to the government's use of his prior guilty plea throughout the trial, and after the government rested its case, Petitioner moved for a directed verdict on the ground that the government failed to introduce sufficient evidence proving that Petitioner was under a duty to disclose. Petitioner also requested that the Court instruct the jury that it could not convict Petitioner for nondisclosure without first finding that he was under a duty to disclose his guilty plea. All of Petitioner's arguments were rejected by the District Court.

2. During trial, Petitioner sought to impeach the government's two primary witnesses with tape-recorded statements they had made to him. These witnesses, Alan and Herb Herr, were Petitioner's alleged co-conspirators, and their testimony formed the backbone of the government's case. Herb Herr, for example, testified that when interviewing Petitioner for a position as a salesman for the wireless deals, Petitioner declared the deals to be "cockamamie" and "phony," and denounced both the failure to disclose commissions and the "outlandish" projections contained in the offering materials. Similarly, Alan Herr testified that Petitioner was responsible for preparing fraudulent financial statements that were included in the radio station offering materials. Accordingly, it was crucial to Petitioner's defense to show that the Herrs had engaged in a conspiracy to falsely inculpate Petitioner in the wireless and radio frauds. During cross-examination, counsel for Petitioner asked each of the Herrs if they had told Petitioner that if he did not plead guilty, they would falsely testify

against him to secure for themselves more favorable sentences. After the Herrs each denied having ever made these statements, counsel confronted them with the transcripts of the tapes. The witnesses reluctantly admitted that they "apparently" made the statements, but explained them as statements either made in jest or while in "denial." Petitioner then sought to play for the jury the following portions of the tapes as: (1) the best evidence of the statements, and (2) impeachment of the assertion that the statements were made "jokingly." The relevant portions of the tapes state:

> Alan Herr: Being accused with corroboration of all kinds of [expletive] which entails a potential based on guidelines.
>
> Petitioner: What's the corroboration?
>
> Alan Herr: Lies, or whatever [the prosecutor] has.
>
> . . .
>
> Lies, Milt. People lie. . . . People lie about you. They lied about me.

Herb Herr, recorded only one week after he entered into his plea agreement with the government, stated:

> Herb Herr: My feeling is we can lie better than he [Sonneberg] can tell the truth. Three good lies outweigh a good truth any time. . .Well, that's his word against ours. And if you're lying [ ], you're going to

> have to lie and if he calls us, we're going to have to be consistent with the lie. And that's all there is to it.

Petitioner's attempt to have these brief portions of the tapes played for the jury so it could evaluate the witnesses' explanations was denied by the court.[2] The District Court ruled that the tape excerpts were inadmissible because the Herrs admitted to making the prior statements.

APPEAL

On appeal, Petitioner raised nine separate grounds for reversal of his conviction. After hearing oral argument, the Court of Appeals for the Third Circuit affirmed Petitioner's conviction without issuing an opinion. Although Petitioner continues to maintain his innocence and the viability of all of the claims made as part of his appeal, for the purposes of this petition, we raise only the two issues detailed above.

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[2] This ruling stands in stark contrast to the court's admission of tapes the government presented during its case, when the court emphasized to the jury that those tapes were the "best evidence of what is happening" and were *more* reliable that the transcripts.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Conviction Is Based on an Unconstitutional Legal Theory That Has Caused a Split in the Circuits -- That the Mail and Wire Fraud Statutes Require a Defendant to Disclose All Material Information Irrespective of His Being Under a Duty to Disclose.

1. A centerpiece of the indictment and of the government's case was the untenable legal theory that Petitioner defrauded customers by failing to disclose his prior guilty plea to a securities law violation. It is axiomatic that a jury's general guilty verdict cannot survive if one of the government's legal theories is unconstitutionally or legally insufficient. *Yates v. United States*, 354 U.S. 298, 312 (1957) (general verdict must be set aside in cases "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); *see Griffin v. United States*, 502 U.S. 46, 55-56 (1991) (same). When a jury is presented with alternative legal theories, one of which is insufficient, the verdict must be reversed so long as it is "impossible to tell" whether the jury convicted on the erroneous theory.

In this case, the government relied, in part, on the theory that Petitioner was guilty of all counts charged in the indictment because he failed to disclose his prior guilty plea to his customers. The District Court, in agreeing with the government that it need not demonstrate Petitioner was under a duty to disclose his prior legal troubles, permitted the jury to convict Petitioner for failing to inform investors of his prior guilty plea. While the prosecution also presented evidence that Petitioner committed affirmative acts that gave

rise to an alternative ground of culpability, "it is impossible to tell which ground the jury selected." *Yates*, 354 U.S. at 312. Accordingly, because one of the prosecution's theories in this case was constitutionally unsound, the entire conviction must be reversed.

Although the Third Circuit's affirmance has contributed to a split in the circuits on the disclosure issue, its ruling is inconsistent with the jurisprudence of this Court. In *Chiarella*, the Court declared that "[w]hen an allegation of fraud is based upon nondisclosure, *there can be no fraud absent a duty to speak.*" *Chiarella*, 445 U.S. at 235 (emphasis added). In other words, where there is no duty to disclose, there is no crime. Although *Chiarella* dealt with securities fraud, its holding -- that silence may constitute a fraud only if "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction" -- is in fact woven throughout the fabric of the federal criminal statutes. *Chiarella*, 445 U.S. at 230. This has been recognized by the Tenth and Eleventh Circuits, which have refused to expand criminal liability for nondisclosure to those who are not under a duty to disclose.

In *United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997), the Tenth Circuit applied *Chiarella*'s requirement of a duty to disclose to the mail and wire fraud statutes. The court cautioned that "the government's standardless theory . . . would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute." *Cochran*, 109 F.3d at 667 (internal quotation omitted). Similarly, in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), the Eleventh Circuit reversed the mail fraud convictions of builders who failed to disclose to their customers that their homes cost significantly more than

comparable homes in the same markets on the ground that the defendants were under no duty to disclose that information. The court explained that "certain people must always disclose facts where nondisclosure could result in harm. This circumstance exists when there is a special relationship of trust, such as a fiduciary relationship, between people." *Id.* at 1557. Applying this principal, the Eleventh Circuit found that "defendants were not in some kind of legal relationship with [their] customers which required defendants to disclose pricing structures under every circumstance," but rather "an arm's length transaction . . . which was of considerable financial importance to the customer." *Id.* at 1557-58.

Rather than respect the authority of *Chiarella* and the instructive precedent of *Brown* and *Cochran*, the lower courts in this case ignored the duty requirement, declaring *Chiarella* inapplicable to the mail and wire fraud statutes because they are "broader" than the securities fraud statute contemplated in *Chiarella*. This finding, first raised as a theory by the government and subsequently adopted by the District Court and the Third Circuit, is untenable.[3] There is nothing in the jurisprudence of this Court that suggests that the Court

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[3] The Seventh Circuit has also ruled that a mail fraud conviction for nondisclosure does not require the government to prove that the defendant was under a duty to disclose. *See United States v. Palumbo Bros.*, 145 F.3d 850, 868 (7th Cir.) ("the omission or concealment of material information, even when a statute or regulation does not impose a duty to disclose, constitutes mail fraud."), *cert. denied*, 67 U.S.L.W. 3270 (1998).

intended this aspect of *Chiarella* to be limited to securities fraud cases.[4]

2. Review is especially warranted in this case as there can be little question that Petitioner was under no duty to disclose his guilty plea to investors. No statute, regulation, or contractual provision created such a duty. *Cochran*, 109 F.3d at 665. It is a matter of hornbook law that "neither party to an arm's-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation." *Chiarella*, 445 U.S. at 239-40 (Burger, J., dissenting) (citing W. Prosser, *Law of Torts* §106 (2d ed. 1955)). There is nothing inherent in the relationship between a telemarketer or salesman such as Petitioner and his customers that is fiduciary, and, as conceded by the government on appeal, the common law has also not traditionally regarded such relationships as fiduciary. The investors knew that Petitioner was just a salesman, and testified that they understood their transactions with him to be arm's-length. Petitioner's relationship with investors was therefore analogous to a stockbroker who -- unless given discretionary control over his client's accounts -- is not under a duty to disclose. *Romano v. Merrill Lynch*, 834 F.2d 523 (5th Cir. 1987); *see Press v. Chemical Inv. Servs. Corp.*, 988 F. Supp. 375, 386

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[4] *Chiarella's* requirement of finding of duty to disclose has also been applied to other criminal statutes. *See United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (in a Section 1001 prosecution, "the government must show that a defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them"); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981) (same), *cert. denied*, 455 U.S. 1016 (1982).

(S.D.N.Y. 1997) ("in the absence of discretionary trading authority delegated by the customer to the broker, a broker does not owe a general fiduciary duty to his client.") (internal quotations omitted).[5]

Moreover, the District Court erroneously relied on inapplicable securities cases to justify its ruling. *See S.E.C. v. Holschuh*, 694 F.2d 130 (7th Cir. 1982); *S.E.C. v. Technical Resources, Inc.*, 1997 WL 1066 (S.D.N.Y. Dec. 22, 1977); and *S.E.C. v. Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983), *aff'd sub nom., S.E.C. v. Cayman Islands Reins. Corp.*, 734 F.2d 118 (2d Cir. 1984). In these cases, the defendants were held to be liable for violating a statutory duty requiring officers and directors to disclose their prior convictions. Here, of course, Petitioner was under no such statutory duty. He was a salesman, not an officer or director. The District Court's expansion of these civil securities cases -- to require a simple salesman uninvolved with the ownership or management of the companies he promoted to disclose a prior guilty plea -- imposes an obligation that far exceeds the scope of the cases and statutes in question, and directly contradicts the case law that has properly cautioned against such an expansion. *See United States v. Matthews*, 787 F.2d 38, 47 (2d Cir. 1986) (rejecting the government's attempt to expand disclosure requirements to the unindicted criminal activity of officers); *United States v. Crop Growers Corp.*, 954 F. Supp. 335 (D.D.C. 1997) (same); *see also Shapiro v.*

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[5] Even where a broker does have discretionary authority, her duty is to only disclose information regarding her client's transactions. There is no suggestion that a broker would ever be under a duty to disclose information concerning her personal background.

Cantor, 123 F.3d 717, 719 (2d Cir. 1997) (accounting firm had no duty to disclose in an offering memorandum that one of the company's principals was a convicted felon). Accordingly, this case presents a compelling circumstance for review, as it is evident from the record that Petitioner, despite being under no duty to disclose his guilty plea, may nonetheless have been convicted for nondisclosure.

3. Review in this case is also necessary as the conviction violates the rule of lenity and is offensive to due process. The rule of lenity provides that "where text, structure, and history fail to establish that the Government's position is unambiguously correct . . . [a court must] resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also McNally v. United States*, 483 U.S. 350, 359-60 (1987) (applying a narrow construction of the mail fraud statute). "More than a perfunctory nod at the rule of lenity . . ." is required when reviewing a conviction based on the alleged breach of a nontraditional fiduciary duty. *United States v. Chestman*, 947 F.2d 551, 570 (2d Cir. 1991). The fundamental due process requirement of fair notice also bars the imposition of criminal liability based on duties that were not clearly established at the time of the conduct. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within the statute's scope . . . the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *see also Marks v. United States*, 430 U.S. 188, 191-92 (1977).

Here, Petitioner could not have had notice that his failure to disclose his guilty plea to customers would later be charged as a criminal act of fraud. The government's theory of fraud imposed a retroactive obligation on Petitioner to disclose his prior guilty plea to customers despite the fact that not a single statute, case or ruling directed him to make such a disclosure. In these circumstances, no reasonable salesperson could have had "fair warning" that any disclosure obligation existed, let alone that nondisclosure "[would] give rise to criminal penalties." *Marks*, 430 U.S. at 191. Such a "standardless theory" threatens to "'put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute.'" *Cochran*, 109 F.3d at 667 (quoting *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.), *judgment vacated on other grounds*, 484 U.S. 807 (1987)); *see also Brown*, 79 F.3d at 1562, n.20 ("allowing the federal fraud statutes to be treated by federal prosecutors as a largely unlimited device . . . [is] extremely worrisome . . . "). In this case, Petitioner not only had no notice that his behavior was criminal, but the securities laws at the time of the "crime" indicated that it was *permissible* for him to not disclose this information. Under 17 C.F.R. § 229.401(f) and Schedule 14A, 17 C.F.R. § 240.14a-101, individuals in Petitioner's position -- brokers, salesmen, partners at companies that marketed investments -- were not required to disclose their prior convictions. Accordingly, Petitioner was convicted of conduct that was, until the moment of his conviction, entirely *consistent* with the relevant laws and regulations. *See Brown*, 79 F.3d. at 1563.

Furthermore, the District Court's ruling sends a frightening message to the securities industry. If this Court were to implicitly endorse the lower Court's holdings by not granting review, it could have a devastating effect:

individuals, companies and whole compliance departments would no longer be able to operate on the assumption that conformance with the securities laws would protect them from criminal prosecution. Even Chiarella, exonerated by this court for securities fraud, could now be convicted under the "broader" mail and wire fraud statutes.

II. The District Court's Erroneous Exclusion of Tape-Recorded Excerpts Precluded Petitioner from Presenting His Defense

Review is also appropriate in this case to reaffirm the Court's holding in *Gordon v. United States*, 344 U.S. 414, 421 (1953), that extrinsic evidence of a prior inconsistent statement is admissible even if the witness admits to making the inconsistent statement. In *Gordon*, the Court set out the parameters of the "best evidence" rule, unequivocally recognizing that extrinsic evidence of an inconsistent statement is more persuasive to a jury than the witness' simple acknowledgment that he made the prior statement:

> The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence . . .The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of

> information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. *We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance.*

Gordon, 344 U.S. at 420 (emphasis added).

The lower courts ruled that Petitioner could not play the tapes of the Herr's exculpating statements to the jury because such evidence was cumulative once the Herrs' admitted to making them. The circuit courts that have considered this issue have split: some follow *Gordon*, others dispense with it. The Second, Seventh and D.C. Circuits unambiguously support *Gordon*'s holding that a witness' concession of a prior inconsistent statement does not affect a party's right to introduce the best evidence of that prior statement, while other circuits agree with the Third Circuit's determination in this case.[6] *Compare United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995); *United States v. Lashmett*, 965 F.2d 179, 181-82 (7th Cir. 1992); *Williams v. United States*, 403 F.2d 176, 179 (D.C. Cir. 1968); *with United States v. Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); *United States v. Jones*, 578 F.2d 1332, 1340 (10th Cir. 1978); *United States v. Hibler*,

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[6] Rule 613(b), Fed. R. Evid. contains no bar to extrinsic evidence of prior inconsistent statements. 4 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 613.05[01] (2d Ed. 1997).

463 F.2d 455, 462 (9th Cir. 1972). Commentators concur with Petitioner's argument, recognizing that "[a] party should be allowed to make his case by the most convincing evidence he can obtain . . . and extrinsic proof of a prior statement will often be far more convincing than the acknowledgment of the declarant, and not cumulative." 3 Louisell & Mueller, *Federal Evidence* § 358, p. 564 (1977). As explained in *Lashmett* -- which resonantly echos the Court's opinion in *Gordon* -- "a declarant's 'admission that a contradiction is contained in a writing should not bar admission of the document itself into evidence . . . because it will emphasize the contradiction to the jury [and] best inform them as to the document's impeaching weight and significance.'" *Lashmett*, 965 F.2d at 182. This reasoning applies with added force to tape-recorded impeachment material. Unlike a prior writing, which simply reinforces that the witness made the statement, a recorded statement contains additional impeaching value, such as tone of voice and inflection.

In this case, the lower courts' ruling that Petitioner was not entitled to present the tape recordings to the jury did more than contribute to the erosion of the Court's ruling in *Gordon*; it dealt Petitioner a devastating blow to his defense. The government conceded on appeal that the testimony of Alan and Herb Herr was critical to its case. Allowing Petitioner to play the tapes would have permitted the jury to assess the credibility of the Herrs' explanation that the statements were made "in jest" by affording it an opportunity to hear the Herrs' words and to evaluate the context, tenor and tone of voice in which the statements were made. *See United States v. Holt*, 817 F.2d 1264, 1274 n. 8 (7th Cir. 1987) ("fact that the witness has tried to 'explain away the contradiction by describing [her] uncommunicated state of mind in making one of the statements,' does not deprive the prosecution of its

right to introduce the contradictory statement."). Instead, the District Court precluded the defense from using tape-recorded excerpts to challenge the Herrs' explanations of their shocking admissions that they intended to commit perjury. In doing so, the court seriously hampered the defense, depriving it of damaging impeachment material, and the chance to present the same quality of evidence introduced by the government. *See Strother*, 49 F.3d at 874. Accordingly, this case presents a compelling opportunity for the Court to revalidate *Gordon* and correct an error that tainted the jury's verdict in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Dated: November 10, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5063

UNITED STATES OF AMERICA

v.

MILTON SONNEBERG,

Appellant

Appeal from a Judgment of Sentence and
Conviction of the United States District Court
for the District of New Jersey
No. 95-cr-00244-5
District Judge: Honorable Nicholas H. Politan

Argued
July 30, 1998

Before: GREENBERG, SCIRICA and McKEE, Circuit Judges

JUDGMENT ORDER

After oral argument and upon considering all of the

contentions raised by appellant, to wit, that: (1) the jury was improperly permitted to convict him of wire and mail fraud on the basis on nondisclosures; (2) the district court's jury instruction set forth the wrong materiality standard; (3) there was insufficient evidence to sustain him convictions on all counts of the second superseding indictment; (4) the district court's erroneous evidentiary rulings and the prosecution's misconduct deprived him of a fair trial; and (5) the prosecutor's rebuttal summation was inflammatory and improper, it is

ADJUDGED AND ORDERED that the judgment of sentence and conviction of the district court, entered on January 9, 1988, be and is hereby affirmed.

BY THE COURT,

/s/
Circuit Judge

Attest:

/s/
Acting Clerk

Date: August 12, 1998

Certified as a true copy and issued in lieu of a formal Mandate on September 11, 1998.

Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

NOT FOR PUBLICATION

February 26, 1997

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

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RE: United States
v. Irwin H. Bloch, et al
Criminal Action No. 95-244 (NHP)

Dear Counsel:

This matter comes before the Court on the motions in limine of defendants Joseph Glenski, Milton Sonneberg, and Bruce Schroeder (hereinafter "Defendants").[7] Oral argument was heard on September 3, 1996, and I reserved decision.[8]

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[7] In their briefs, defendants Glenski, Sonneberg, and Schroeder move the Court to allow each of them to join in the relevant motions of their co-defendants. At oral argument, defendants Bloch and Barschow also requested that they be permitted to join in the motions. The Court will permit such joinder for the purpose of these motions in limine. Where appropriate, the Court will indicate when the granting of relief is applicable to only one of the defendants.

[8] After oral argument, the Court ruled on a number of defendants' motions for the bench: (1) defendants' motion for an evidentiary hearing to determine the admissibility of materials allegedly provided to the government by the Securities and Exchange Commission was DENIED; (2) defendants' motion for a bill of particulars was GRANTED to the extent that the government agreed to provide to defendants within thirty days the names of co-conspirators; (3) defendants' motion for a witness list was DENIED; (4) defendants' motion seeking the Government to designate documents under Fed.R.Crim.P. 16(a) (1) (C) was DENIED; (5) defendants' motion seeking the disclosure of expert testimony was DENIED and the Government agreed to

For the reasons stated herein, defendants' motions are **DENIED**.

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provide such information thirty days prior to trial pursuant to Fed.R.Crim.P. 16 (a) (1) (E); (6) defendants' motion seeking production of Brady material was GRANTED only to the extent that the Government has complied with such obligations; (7) defendants' motion seeking production of Giglio material was GRANTED only to the extent that the Government agreed to provide Giglio material two weeks prior to trial; (8) defendant's motion seeking production of Jencks material was DENIED and the Government agreed to provide said material one week prior to trial; (9) defendants' motion for pretrial notice of the Government's intention to offer evidence under Fed.R.Evid. 404(b) was GRANTED to the extent that the Government agreed to provide such notice thirty days prior to trial. See Order dated September 9, 1996.

STATEMENT OF FACTS

Defendants, along with Irwin H. Bloch and James Barschow, are charged with fourteen counts of mail fraud, wire fraud, and interstate transportation of money obtained by fraud. These counts relate to an alleged scheme to defraud persons who purchased membership interests in limited liability companies engaged in the wireless cable business. Defendants Bloch and Sonneberg are also charged with fifteen counts of mail fraud, wire fraud, and interstate transportation of money obtained by fraud in relation to an alleged similar scheme involving radio stations. Defendant Bloch is charged with five additional counts of making false statements to a bank. The Indictment was delivered on May 23, 1995.[9]

The present motioned followed. After oral argument, but before the Court decided the motions, the Government obtained a Superseding Indictment against defendants.[10] The parties were permitted to submit supplemental briefs.

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[9] After oral argument on the motions but before the release of this Opinion, defendant Bloch pled guilty to numerous counts of the Indictment. Hence, the within Opinion is no longer applicable to him.

[10] The Superseding Indictment is very similar to the original Indictment. The changes include the removal of Irwin "Sonny" Bloch as a defendant because of his plea of guilty, identification of additional transactions as the basis for some of the charged violations of mail fraud, wire fraud, and interstate transportation of money obtained by fraud, and more detailed descriptions of the alleged material omissions made by defendants.

DISCUSSION

I. Severance of Trial

Pursuant to Rule 8 of the Federal Rules of Criminal Procedure, defendants have been joined in the same Indictment. Defendants move for severance or bifurcation of the trial as to counts one through fourteen from counts fifteen through thirty-five. Defendants assert that joinder was improper because counts fifteen through thirty only charge defendants Sonneberg and Bloch with the radio station scheme. In the alternative, defendants argue that the trial should be severed because it would be prejudicial to try all the counts together.

Rule 8(b) provides for the joinder of defendants in a single indictment where the defendants are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed.R.Crim.P. 8(b). Not all of the defendants need be charged in every count of the indictment. Id. Where defendants are improperly joined under this Rule, severance is mandated. United States v. Eisenberg, 773 F. Supp. 662, 696 (D.N.J. 1991) (citation omitted).

In analyzing joiner, the court must look into the facts alleged in the indictment. United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir.), cert. denied sub nom. Idone v. United States, 502 U.S. 925 (1991). In a motion challenging joinder, all of the allegations in the indictment are taken as true. United States v. Harrelson, 754 F.2d 1153, 1176 (5th Cir.), reh'g denied, 766 F.2d 186 (5th Cir.), cert. denied, 474 U.S. 908, cert. denied, 474 U.S. 1034 (1985). Permissible joinder of multiple defendants in the same

indictment requires that the defendants be charged with participation in the same act or transactions or the same series of acts of transactions. United States v. Marionneaux, 514 F.2d 1244, 1248 (5th Cir. 1975); United States v. Whitehead, 539 F.2d 1023, 1025 (4th Cir. 1976). The series of transactions must be "so interconnected in time, place and manner as to constitute a common scheme or plan." United States v. Santoni, 585 F.2d 667, 673 (4th cir. 1978), cert. denied, 440 U.S. 910 (1979); see also United Stated v. Velasquez, 772 F.2d 1348, 1348 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); United States v. Attanasio, 870 F.2d 809, 814-15 (2d Cir. 1989). There must be substantial identification of facts or participants between the joined offenses. United States v. Butera, 677 F.2d 1376, 1384-85 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988), reh'q denied, 874 F.2d 242 (1989).

The purpose of joinder of defendants in a single indictment is to encourage trial convenience and conserve judicial and prosecutorial resources. United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980). Therefore, the court may consider the evidence which is available and contained in the pretrial documents. United States v. McGill, 964 F.2d 222, 242 (3d Cir.) (citations omitted),cert. denied, 506 U.S. 1023 (1992; United States v. Wilson, 26 F.3d 142, 153 (D.C. Cir. 1994), cert. denied sub nom. Briscoe v. United States, 115 S. Ct. 1430 (1995).

In the instant case, the Indictment charges two conspiracies with numerous similarities. Both conspiracies involve similar defendants and investors, i.e., alleged victims. The alleged schemes were perpetrated over the same time frame. Similar alleged false representations relating to

financial performance of the investments were used to further the frauds. Finally, both conspiracies centered around the radio broadcasts of The Sonny Bloch Show. Hence, the Court is satisfied that joinder of the defendants in the single Indictment was proper under Rule 8(b).

Even where joinder is proper, the Court may exercise its discretion and sever the trial pursuant to Rule 14 of the Federal Rules of Criminal procedure. Zafiro v. United States, 506 U.S. 534, 537-38 (1993). Rule 14 allows the trial court to sever counts or defendants where joinder would result in a manifestly unfair trial. United States v. Vastola, 670 F. Supp. 1244, 1261 (D.N.J. 1987). The court, when analyzing severance under this Rule, must balance the public interest in joint trials against the possibility of prejudice to the defendants. Eufrasio, 935 F.2d at 568; United States v. Braig, 702 F. Supp. 547, 548 (E.D. Pa. 1989). The court must determine "whether the evidence is such that the jury cannot be expected to 'compartmentalize' it and then consider it for its proper purposes." United States v. Dansker, 537 F.2d 40, 62 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

The district court must act to "make the trial manageable and protect the rights of the defendants to individualized consideration." United States v. Price, 13 F.3d 711, 717 (3d Cir.), cert. denied sub nom. Reaves v. United States, 114 S. Ct. 1863 and cert. denied, 115 S. Ct. 155 (1994). A motion will not be granted unless the defendants "demonstrate clear and substantial prejudice resulting in a manifestly unfair trial." United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981) (citation omitted); see also government of V.I. v. Sanes, 57 F.3d 338, 341 (3d Cir. 1995) (citations omitted); United States v. Console, 13 F.3d 641, 655 (3d Cir. 1993),

cert. denied sub nom. Curcio v. United States, 114 S. Ct. 1660 and cert. denied sub nom. Markoff v. United States, 115 S. Ct. (1994).

In the case sub judice, defendants assert that they will be prejudiced by a spill-over of evidence from one conspiracy to the other. Defendants have failed to show, however, that the jury would be unable to compartmentalize the evidence as instructed by the Court. United States v. Borish, 452 F. Supp. 518, 524 (E.D. Pa. 1978); see also Zafiro, 506 U.S. at 539 (holding that "limiting instructions [] often will suffice to cure any risk of prejudice"). Because defendants have not demonstrated how they would be prejudiced by a single trial of both conspiracies, the court will not exercise its discretion to sever the trial. Accordingly, defendants' motion for severance is **DENIED.**[11]

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[11] In the alternative, defendant Schroeder moves for bifurcation of the trial. Defendant asserts that prejudice will result if the jury is allowed to hear evidence on counts fifteen through thirty-five while deliberating over counts one through fourteen. Defendant relies solely on the Third Circuit's decision in United States v. Joshua, 976 F.2d 844 (3d Cir. 1992). The instant case is distinguishable in many aspects from Joshua, the court analyzed the bifurcation of a trial of a single defendant charged with armed robbery and felon-in-possession of a firearm. Id. at 846. There, the court was concerned with the jury hearing evidence of the defendant's previous criminal convictions, evidence necessary for the felon-in-possession charge, when deliberating over the armed robbery charge. Id. The present case does not involve a felon-in-possession charge, United States v. Jacobs, 44 F.3d 1219, 1221-22 (3d Cir.), cert. denied, 115 S. Ct. 1835

II. Surplusage in Indictment

Defendants assert that portions of the Indictment which make reference to defendants "failure to disclose the prior criminal conviction of, and civil fraud injunctions against, [the defendants], and their co-conspirators" should be redacted. See, e.g., Superseding Indictment at Count 1, ¶¶ 21 (g), 31(g), 41(g); Count 15 ¶ 12(g). In addition, defendants move to strike any references in the Indictment to the limited liability companies as "securities" or "investment contracts".[12] Defendants argue that said references risk creating great unfair prejudice. The Government, on the other hand, argues that the defendants' criminal and civil fraud histories are relevant and material to the charges in the Indictment.

Pursuant to Federal Rule of Criminal Procedure 7(d), "[t]he court on motion of the defendant may strike surplusage from the indictment. . . ." Fed.R.Crim.P. 7(d). It is within the court's discretion to strike language which it finds inmaterial, irrelevant, or prejudicial. United States v. Marshall, 985 F2d 901, 905 (7th cir.) (citations omitted),

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(1995), but instead the indictment charges defendants with two similar conspiracies and fraud. Hence, bifurcation pursuant to Joshua is not warranted in this case.

[12] Defendant Sonneberg conclusively asserts that these mistaken references are "highly prejudicial". However, defendant fails to demonstrate the existence of such prejudice. Accordingly, the Court presumes that the Indictment is proper, and defendant has not satisfied the burden necessary for redaction. See Eisenberg, 773 F. Supp. at 700.

cert. denied, 508 U.S. 952 and cert. denied sub nom. Elliot v. United States, 510 U.S. 831 (1993). the motion to strike surplusage is only granted where the allegations are both irrelevant to the crime charged and are inflammatory and prejudicial. Eisenberg, 773 F. Supp. at 700 (citations omitted). However, "[a]n indictment may properly set forth background information to a defendant's motive and intent." United States v. Persico, 621 F. Supp. 842, 860 (S.D.N.Y. 1985) (citations omitted); see also United States v. Isabel, 945 F.2d 1193, 1203 (lst Cir. 1991).

In the case at hand, the references in the Indictment to the prior criminal convictions and civil fraud injunctions against defendants are not only relevant, but actually constitute the alleged misrepresentations which caused the conspiracy to defraud. See, e.g. Securities & Exchange Comm'n v. Holschuh, 694 F.2d 130, 142 (7th Cir. 1982); Securities & Exchange Comm'n v. Technical Resources, Inc., No. 76-111, 1997 WL 1066, at *4--5 (D.C.N.Y. 1977); Securities & Exchange Comm'n v. Scott, 585 F. Supp. 1513, 1526 (S.D.N.Y. 1983), aff'd sub nom. Securities & Exchange Comm'n v. Cayman Islands Reins. Corp., Ltd., 734 F.2d 118 (2d Cir. 1984). Unlike the reference to the defendants in United States v. Verra, the facts contained in the present Indictment are material to the charges, and do not merely serve any "purpose other than possible prejudice to the defendants." 203 F. Supp. 87, 90 (S.D.N.Y. 1962). Such legally relevant facts cannot be stricken as surplusage, no matter how prejudicial. See United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993) (quotation omitted).

Moreover, these acts are evidence which the Government will allegedly use to prove defendants' background, plan, intent, motive and knowledge in support of

the fraud and conspiracy charges. these activities are inextricably intertwined with the charged offenses; therefore, Rule of Evidence 404(b) does not prevent their admission in the Indictment. See United States v. Zolicoffer, 869 F.2d 771, 773 (3d Cir.), cert. denied, 490 U.S. 1113 (1989); United States v. Bertoli, 854 F. Supp. 975, 1060-61 (D.N.J.), vacated in part on other grounds, 40 F.3d 1384 (3d Cir. 1994). Furthermore, the admission of such allegations in the Indictment does not violate defendants' Fifth Amendment right not to testify at trial. See United States v. Weber, 437 F.2d 327, 335 (3d Cir.) (quotation omitted), cert. denied, 402 U.S. 932 (1971).

III. Hearing on Admissibility of Evidence Obtained in SEC's Civil Investigation

Defendants request a hearing to determine the admissibility of evidence obtained through the Securities and Exchange Commission's ("SEC") civil investigation, which the Government plans to introduce at the criminal trial.

The Government is entitled to reap the benefits of discovery and testimony developed in a parallel civil action. United States v. Kordel, 397 U.S. 1, 11-12, cert. denied sub nom. Detroit Vital Foods, Inc. v. United States, 400 U.S. 821 (1970); United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987) (citation omitted), cert. denied sub nom. Forde v. United States, 488 U.S. 974 (1988); United States v. Teyibo, 877 F. Supp. 846, 855 (S.D.N.Y. 1995), aff'd, No. 95-1601, 1996 WL 167868 (2d Cir. Apr. 10, 1996); United States v. First Jersey Securities, No. 85-8585 (RO), 1987 WL 8655, at *2-3 (S.D.N.Y. Mar. 26, 1979). It is axiomatic, however, that the SEC may not pursue an investigation solely to gather evidence for a criminal

prosecution. In re Sealed Case, 676 F.2d 793, 824 n.127 (D.C. Cir. 1982). An administrative agency acts beyond its statutory powers in conducting an investigation if its sole purpose is the enforcement of criminal laws and the agency has no criminal law enforcement authority. United States v. Educ. Dev. Network Corp., 884 F.2d 737, 742 (3d Cir. 1989), cert. denied, 484 U.S. 1078 (1990); Donovan v. Spadea, 757, F.2d 74, 77-78 (3d Cir. 1985); Securities & Exchange Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1387 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

To obtain a hearing on the issue of such bad faith, the defendant must make factual allegations which are sufficiently definite, specific, detailed and non-conjectural to substantiate a claim. United States v. Harrelson, 705 F.2d 733, 737 (5th Cir. 1983). General and conclusory allegations based upon suspicion are not enough. United States v. Migely, 596 F.2d 511, 513 (1st Cir.) (quotation omitted), cert. denied, 442 U.S. 943 (1979).

In the first instant case, defendants have failed to establish any factual basis for a hearing. Defendants merely assert that "there exists the possibility that the SEC conducted its investigation solely with a purpose to obtain evidence for a criminal prosecution . . . . Schroeder's Br. at 19. Defendants do not cite to a single fact that provides the slightest evidence for the assertion of bad faith by the Government or the SEC. Accordingly, defendants request for a hearing is denied.

IV. Dismissal of Indictment

Defendants move to dismiss the Indictment based on the Government's misconduct which allegedly caused

constitutional violations of defendants Fifth and Sixth Amendment rights. As an alternative ground, defendants argue that the Government's conduct mandates the Court's exercise of its supervisory powers to dismiss the Indictment.

A. Prosecution's Misrepresentation to Defendant Sonneberg

Defendant Sonneberg asserts that the Indictment against him should be dismissed because of alleged misrepresentations made by the government. Defendant states that on April 4, 1995, he made statements to the government based on its assurance that he was not a target of the investigation. On said date, the government and defendant entered into a proffer agreement, governing the Government's ability to use said statements. A month later, defendant was charged in the instant Indictment.

Defendant relies on numerous cases which address the Government's breach of plea agreements or immunity agreements. Such reliance is misplaced because defendant Sonneberg, by his own admission, only entered into a proffer agreement. Assuming arguendo that the Government did imply that defendant was not the subject of the investigation, defendant's reliance on said assurance does not implicate a due process right. United States v. Green, No. 95-00591, 1994 WL 161364, at *10 (E.D. Pa. Apr. 16, 1994); United States v. Bloom, 450 F. Supp. 323, 334, (E.D. Pa. 1978).

The proffer agreement, signed by both defendant and his counsel, sets forth the full understanding between the parties. According to the agreement, the Government is unable to use defendant's statements to obtain other evidence, during cross-examination of defendant if he chooses to testify, or during

sentencing. The statement specifically states that "[n]o understandings, promises, agreements or conditions have been entered into with regard to the interview other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties." Proffer Agreement at ¶ 3 (April 4, 1995).

Defendant does not challenge the validity of said proffer agreement, but merely asserts that it was subject to other promises not stated in the document. Said argument is in contradiction to the agreement which defendant knowingly and voluntarily signed with the advice of counsel. In fact, defendant himself is unsure of whether the Government intended to indict him at the time his statements were made in accordance with the proffer agreement. Defendant merely draws the conclusion from the proximity between when the statements were made and when he was indicted. Accordingly, defendant Sonneberg has no basis upon which to challenge the Indictment based on statements allegedly made by the Government.

B. Inappropriate, Inaccurate and Misleading Information by Prosecutor

Defendants assert that the Indictment should be dismissed because the Government improperly instructed the grand jury as to the law. See United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir. 1989); United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982). In particular, defendants assert that the Government referred to the interests in limited liability companies ("LLCs") as "securities." See, e.g., Superseding Indictment at Count 1, ¶¶ 15, 19, 25, 26, 35, 39, 54(a); Count 9, ¶ 2; Count 15, ¶¶ 5(b), 9; Count 20-23, ¶ 5. Defendants argue that said interests are not securities

subject to regulation by the SEC. The Government disagrees.

Defendants state that "there are copies of two legal opinions, one by a nationally known firm, suggesting that interests in [limited liability companies] cannot categorically be classified as securities. . . ." Sonneberg's Br. at 21. Rather than citing case law, however, defendants attach to their brief copies of letters from two firms. See Sonneberg's Exhibit D. The first letter, addressed to someone at the SEC, merely states that it is the opinion of the concerned wireless corporation that interests in limited liability companies are not securities. See Id. at 1. The second letter is unaddressed and partially illegible. See Id. at 11.

In contrast, the Government relies on numerous federal court opinions which support the theory that interests in limited liability companies can be treated as securities. The United States Supreme Court has emphasized that "'because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto.'" Koch v. Hanskins, 928 F.2d 1471, 1475-76 (9th Cir. 1991) (quoting United Housing Found., Inc. v. Forman. 421 U.S. 837, 849 reh'q denied, 423 U.S. 884 (1975) (other citation omitted0)). Furthermore, courts have found limited liability interests to constitute investment contracts as defined by § 2(1) of the Securities Act of 1933 and § (3) (a) (1) of the Securities Exchange Act of 1934. Securities & Exchange Comm'n v. W.J. Howey & Co., 328 U.S. 293, 301, reh'q denied, 329 U.S. 819 (1946); Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir.), cert. denied, 454 U.S. 897 (1981). Similarly, courts have determined limited partnership interests in cable television systems to be securities. See Sibel v. Scott, 725 F.2d 995,

999 (5th Cir.), cert. denied, 547 U.S. 1242 (1984). Thus, the Government asserts that the SEC regulations may be analogously applied to LLCs.

The Court finds that there was sufficient existing law to support the Government's representation to the grand jury that interests in limited liability corporation are regulated similar to securities. Hence, defendants' motion to dismiss the Indictment based on improper legal instructions is denied.

C. Prosecutor's Revelation of Defendants' Prior Convictions

Defendants Sonneberg and Glenski move to dismiss the Indictment because of the Government's revelation to the grand jury of their prior convictions and civil fraud injunctions. The Indictment states that defendants committed fraud by failing to reveal to potential investors their previous convictions. As a result, defendants assert that this information improperly prejudiced the grand jury.

In order to dismiss an indictment due to prosecutorial misconduct, the court must be presented with evidence of the misconduct and resulting prejudice. Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). Prejudice is concluded when "'the violation substantially influenced the grand jury's decision to indict,' or . . . there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Id. at 256 (quotation omitted); accord United States v. Soberon, 929 F.2d 935, 939-40 (3d Cir.), cert. denied, 502 U.S. 818 (1991). the Third Circuit recognized that to fall within this narrow and extreme exception that "'structural protections of the grand jury' [must] have been compromised and remedies other than

dismissal would be impractical." Id. at 940 (quotation omitted). In fact, the Soberon court acknowledged that "[t]he only instances in which the Supreme Court has recognized this exception to the harmless error rule have involved grand juries selected in a discriminatory manner, which tainted the fact finding process itself." Id.

The cases cited by defendants are distinguishable on their facts.[13] For example, in United States v. Serubo, 604, F.2d 807, 818 (3d Cir. 1979), and United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983), the courts held that dismissal of the indictment was warranted where the prosecutor mentioned the defendant's criminal history which was unrelated to the present charges. In fact, the one case which defendants attempt to distinguish, Eisenberg, is more factually aligned with this case than any other. 773 F. Supp. 553. In Eisenberg, the court denied a defendant's motion to dismiss an indictment based on the prosecutor's revelation to the jury of the defendant's previous nolo contendere plea. Id. at 708. The court concluded that "passing reference by the

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[13] Defendants also cite United States v. Vetere, 663 F. Supp. 381, 387 (S.D.N.Y. 1987) for the proposition that an indictment should be dismissed if the prosecutor depicts the defendant as a "bad person." The Vetere case, however, is factually inapposite to this matter. In Vetere, the prosecutor's statements were inaccurate and made reference to the defendant's criminal history based on a ten-year old newspaper article. Id. at 387. The court found that such unfounded speculation created a substantial distortion of the record, requiring dismissal of the indictment. Id. Here, defendants do not challenge the accuracy or factual basis of the statements presented by the Government to the grand jury.

Government to the nolo plea on two occasions with two witnesses did not create 'grave doubt' as to the independence of the grand jury . . . ." Id. at 709.

Similarly, in the instant case, the Government's recitation of defendants' past criminal convictions and civil fraud injunctions in the relevant counts does not create grave doubt. Rather, this information is a crucial element of the fraud charges asserted against defendants. Hence, the Court finds that the information presented by the Government about the existence of defendants civil and criminal history were not improper, and did not create grave doubt in the independence of the grand jury.

D. Prosecutorial Vindictiveness

Defendant Sonneberg moves for dismissal of the Indictment against him based on the alleged vindictiveness of the Government. Defendant asserts that the Government has attempted to coerce him to plead guilty by threatening to indict defendant's son for tax fraud.

A defendant's due process rights are violated when a prosecutor punishes him or her for exercising a legal right, e.g., going to trial. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977), reh'g denied, 435 U.S. 918 (1978). However, "in the 'give-and take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id. "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable' -- and permissible -- 'attribute of any legitimate system which tolerates and

encourages the negotiation of pleas.'" Id. at 364 (quotation omitted). "[S]o long as the prosecutor has probably cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion." Id.

Courts have suggested, however that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused . . . might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." Id. at 364 n.8 (emphasis added). In such circumstances, the courts have merely required that the court accepting the guilty plea take special care to determine that the plea is voluntary. United States v. Morrow, 914 F.2d 608, 613 (4th Cir. 1990) (citation omitted). For example, in Morrow, the district court found that a son's guilty plea was voluntary even though the plea agreement required that both the father and son pled guilty. Id. at 614. Defendant fails to cite any case which mandates dismissal of the Indictment because of improprieties during plea negotiations.

Here, defendant Sonneberg has not pled guilty; therefore, there is no plea agreement for the Court to analyze. Furthermore, assuming arguendo that the Government had informed defendant of their intent or ability to prosecute his son, defendant does not challenge such information as false or without probable cause. Accordingly, the court finds no valid reason to dismiss the present Indictment against defendant Sonneberg.

V. Disclosure of Grand Jury Transcripts

Federal Rule of Criminal Procedure 6 (e) (2) requires that grand jury proceedings be kept secret. The Rule provides, in pertinent part:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules . . . .

Fed.R.Crim.P. 6 (e) (2). The court, however, may permit the disclosure of said transcripts "at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 6 (e) (3) (C) (ii). The defendant must make a significant showing of "gross or prejudicial irregularities in the conduct of the grand jury." United v. Budzanoski, 462 F.2d 443, 454 (3d Cir.) (citation omitted), cert. denied, 409 U.S. 949 (1972). A defendant must show a particularized need, not just mere speculation, to support a motion seeking such pre-trial discovery. Id.; Douglas Oil Co. of Calif. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 reh'q denied, 361 U.S. 395 (1959).

Defendants assert that the facial defects in the instant Indictment, i.e., references to defendant Glenski's prior conviction, mention of the civil fraud injunctions, and alleged improper instructions of the law, require further investigation of the jury transcripts. In the alternative, defendants urge the

Court to inspect the grand jury transcripts in camera. Because the Court has determined that none of these grounds, assumed to be true, warrant dismissal of the Indictment, defendants' motion is denied.

Conclusion

For the foregoing reasons, defendants' motions are **DENIED**.[14]

An appropriate Order accompanies this Opinion.

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN

U.S.D.J.

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[14] Defendant Sonneberg also moved to suppress any statements made by him which have not been turned over by the Government pursuant to Fed.R.Crim.P. 16, to suppress evidence obtained from a search warrant and evidence have not been disclosed by the Government to the defense, and to require law enforcement officers to retain their rough notes. These motions are DENIED AS MOOT because the Government has no undisclosed statements of defendant Sonneberg, has disclosed any necessary evidence from the search, and is aware of its obligation to maintain law enforcement officials rough notes.

Finally, defendants' joint motion for leave to file additional motions is DENIED. Defendants have had ample time to seek pretrial relief from this Court and the commencement of the trial is imminent.

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-765

In the Supreme Court of the United States

OCTOBER TERM, 1998

MILTON SONNEBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of mail and wire fraud based on a scheme that included his failure to disclose to investors his conviction for securities fraud and an injunction prohibiting him from selling securities.

2. Whether the district court properly excluded tape-recorded evidence of a prior inconsistent statement made by a witness, when that statement was read in open court to the witness, and the witness admitted that he had made the inconsistent statement.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported. The memorandum opinion of the district court denying petitioner's pretrial motions (Pet. App. A3-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1998. The petition for a writ of certiorari was filed on November 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiracy to commit wire fraud and

interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 371; one count of conspiracy to commit mail fraud and interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; 23 counts of interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 2314; and four counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to 76 months' imprisonment, to be followed by five years' supervised release. He was also ordered to pay $5,200,000 in restitution. See Pet. C.A. Br. App. 2-4. The court of appeals affirmed. Pet. App. A1-A2.

1. From 1993 through 1995, petitioner participated in two fraudulent schemes. The first involved the sale of so-called limited liability company (LLC) interests in a wireless cable television venture known as Nationwide. Petitioner sold LLC interests in Nationwide even though he realized that those interests were securities, and even though he had been enjoined by the Securities and Exchange Commission (SEC) from selling securities because of a guilty plea to a securities fraud conspiracy charge. Petitioner concealed his involvement in the sale of interests in Nationwide by using the alias "Sonny Hill." Pet. C.A. App. A491, A709-A710. Petitioner also lied to investors over the telephone by greatly exaggerating the returns that they could make on their investments in Nationwide. *Id.* at A365, A432. Co-defendant Irwin

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[1] The first page of the judgment of conviction in petitioner's case states that he was convicted on the mail fraud Counts "16 and 19" (Pet. C.A. Br. App. 1) but the rest of the judgment makes clear that he was in fact convicted on mail fraud Counts 16 *through* 19 (see *id.* at 3, 4).

"Sonny" Bloch, a nationally syndicated radio personality, promoted the scheme on his radio show but failed to disclose that he was receiving fees for such promotions. The conspirators also failed to reveal that many of the participants had criminal records. *Id.* at A494, A708-A711, A864-A865. Petitioner and his co-participants in the scheme sold about $9,375,000 in interests in Nationwide, but they took approximately 40% of that amount in commissions, leaving no money to turn over to Nationwide's management committee. *Id.* at A713; Gov't C.A. Supp. App. 16.

The conspirators also fraudulently promoted LLC interests in two Venezuelan wireless cable ventures. Pet. C.A. App. A498. They marketed those LLCs in the same deceptive manner as in the earlier scheme. *Id.* at A498-A501, A711-A714, A866-A873. Petitioner again concealed his identity by posing as "Sonny Hill." *Id.* at A360-A361, A371-A373. The conspirators took as their commissions about one third of the almost $3,000,000 invested. Gov't C.A. Supp. App. 14. Petitioner made almost $57,000 from the wireless cable scheme. *Ibid.*; Pet. C.A. App. A1354.

In the summer of 1994, petitioner joined Bloch and others in selling LLC interests for the purchase of radio stations. Petitioner created offering brochures for the radio stations; those brochures contained false financial information. Pet. C.A. App. A506, A718, A885, A887, A1169. The conspirators sold interests in three radio stations and earned 20-25% in commissions for themselves. *Id.* at A508-A509, A718, A721, A884-A888. Petitioner earned $149,000 on the radio station deals. *Id.* at A1358; Gov't C.A. Supp. App. 14.

2. At trial, two of petitioner's co-conspirators, Herbert Herr and Alan Herr (Herbert's son), testified for the government. On cross-examination, petitioner's

counsel showed Herbert Herr the transcript of a tape-recorded conversation among petitioner, Herbert Herr, Alan Herr, and Stanley Mindel (another of the conspirators), which took place shortly after Herbert Herr had signed a plea agreement to cooperate with the government. Reading from the transcript, petitioner's counsel asked Herbert Herr: "Did you tell [petitioner], quote: My feeling is we can lie better than he [petitioner] can tell the truth? Did you say 'Three good lies can outweigh a good truth any time?' Did you say that to [petitioner]?" Pet. C.A. App. A607. Herbert Herr acknowledged making that statement. *Ibid.* Petitioner's counsel then read further from the transcript and asked: "Did you also say to him and to Alan and Stanley, * * * 'Well that's his word against ours. And if you're lying, speaking to Alan and Stanley, you're going to have to lie and if he calls us, we're going to have to be consistent with the lie. And that's all there is to it.'" *Ibid.* Herbert Herr acknowledged making that statement as well. *Ibid.*

When Alan Herr testified, he initially denied having had any conversation with his father, Mindel, or petitioner about lying in order to obtain a favorable deal from the government. Pet. C.A. App. A808. Petitioner's counsel then handed Alan Herr the transcript of the tape-recorded conversation, and asked him whether he had ever said to petitioner: "[Y]our option is to be indicted, lie and be at [the prosecutor's] mercy or tell the truth, stand up for what you believe in and * * * a year goes by, you're on the hook, you'll be in all the papers and then you have to sit for a five or six month potential trial in the defense stand right next to Sonny [Bloch]." *Ibid.* After reading the transcript, Alan Herr acknowledged making the statement. *Ibid.*

Defense counsel requested that the full tape recordings of the conversations be played to the jury. The trial court, however, concluded that the recording should not be played to the jury because it was extrinsic evidence dealing only with the witnesses' credibility, and not substantive evidence. In addition, the court concluded that the matter had been fully explored on defense counsel's "both incisive and detailed cross-examination of the witnesses as to these prior statements," and that "it is before the jury in sufficient form for [counsel] to argue it in the summation of the matter." Pet. C.A. App. A1369.

3. On appeal, petitioner argued, *inter alia*, that his convictions could not stand because (he contended) liability may be imposed under the mail and wire fraud statues for an omission only if the government proves that the defendant had a duty to disclose the omitted information. Petitioner maintained that, because he had no fiduciary duty to the investors to whom he had marketed the LLC interests, he also had no duty to disclose to them the fact of his securities fraud convictions and the injunction prohibiting him from selling securities, and therefore he could not be punished for failing to disclose that information. See Pet. C.A. Br. 14-17. Petitioner also contended that the trial court had improperly excluded the tape recording of the conversation among himself, Herbert Herr, Alan Herr, and Stanley Mindel. See *id.* at 38-41. The court of appeals affirmed by judgment order. Pet. App. A1-A2.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that he was improperly convicted of mail and wire fraud based on his failure to disclose to investors his conviction for securities fraud and the injunction prohibiting him from

selling securities. He argues that the decision below is inconsistent with this Court's decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980), and conflicts with decisions of other courts of appeals supposedly holding that a conviction for mail or wire fraud based on a theory of omitted material statements requires proof that the defendant had an independent legal duty to disclose those statements. There is no merit to that contention. Further, even if there were some basis to petitioner's contention that a conflict among the circuits exists, this case would not be an appropriate vehicle for resolution of that disagreement, because the court of appeals did not issue any opinion addressing the merits of petitioner's contention about the scope of the mail and wire fraud statutes.

In *Chiarella*, the defendant, a printer who had access to announcements of corporate takeover bids before they were made public, was charged with securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, for purchasing stock in the target companies on the basis of nonpublic information about the planned takeovers. This Court reversed the conviction, and ruled that liability under Section 10(b) and Rule 10b-5 based on a failure to disclose material, nonpublic information (as opposed to making affirmative misrepresentations) when trading in securities must be "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." 445 U.S. at 230. The Court relied on the common law principle that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so." *Id.* at 228.

The mail and wire fraud statutes, however, are not limited to matters that would be punishable as common-law fraud. See *Durland* v. *United States*, 161 U.S. 306, 313-314 (1896); *United States* v. *Moore*, 37 F.3d 169, 172-173 (5th Cir. 1994); *United States* v. *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989); *United States* v. *Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987). The courts have also long recognized that, under the mail and wire fraud statutes, "[t]he fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard." *Ibid.*; *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967); *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958). Indeed, it has long been settled that, to be punishable as mail or wire fraud, a deceptive scheme "need not be fraudulent on its face." *United States* v. *Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978); see *Oesting* v. *United States*, 234 F. 304, 307 (9th Cir. 1916), cert. denied, 242 U.S. 647 (1917). "[I]f a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single fact makes no difference." *Silverman* v. *United States*, 213 F.2d 405, 407 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

Applying those standards, the lower courts have generally recognized that "omissions or concealment of material information can constitute fraud * * * cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation." *United States* v. *Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986). For example, in *United States* v. *Riebold*, 135 F.3d 1226 (8th Cir.), cert. denied, 118 S. Ct. 2356 (1998), the defendant sold interests in nonexistent gold and copper mining operations and failed to disclose that he had previously been convicted for having perpetrated

similar fraudulent schemes. The court of appeals affirmed over the defendant's claim that he had no obligation to disclose his prior convictions. The court ruled that, in the circumstances of that case, where the defendant's conduct was similar to the conduct for which he had previously been convicted, "the fact that [the defendant] concealed his past went directly to whether he intended to devise a scheme to defraud under [the wire fraud statute]." 135 F.3d at 1229. The court also concluded that, because certain investors testified that they would not have invested had they known about the defendant's prior convictions, his "concealment of his prior convictions was an important part of the scheme; otherwise, investors would have been hard to come by." *Ibid.* Similarly, in *United States* v. *Moore*, *supra*, the court concluded that the failure to disclose a first mortgage on property offered for sale was mail fraud, notwithstanding the defendants' contention that they had no duty under state law to disclose the mortgage to the purchaser. See 37 F.3d at 172-173.

Petitioner contends (Pet. 13) that *United States* v. *Cochran*, 109 F.3d 660 (10th Cir. 1997), applied *Chiarella*'s requirement of a duty to disclose to the mail and wire fraud statutes. The *Cochran* court, however, did not hold that an omission or concealment violates the mail fraud statute only when there is an independent legal duty to make disclosure. Although the court noted that the defendant had relied on that position, it observed that "deceitful concealment of material facts may constitute actual fraud," *id.* at 665, and it also stated that, "[e]ven apart from a fiduciary duty, in the context of certain transactions, a misleading omission is actionable as fraud if it is intended to induce a false belief and resulting action to the advantage of the mis-

leader and the disadvantage of the misled," *ibid.* (internal quotation marks, brackets, and ellipsis omitted). See also *ibid.* (noting government's "alternate theory" that disclosure was required because "any statements unaccompanied by such disclosure [would be deemed] fraudulent"). Although the court reversed certain of the defendant's wire fraud convictions in that case, it did so not because the wire fraud statute requires a duty to disclose, but rather because there was no evidence of a fiduciary relationship that would have entailed such a duty *and* because the evidence did not show that a bond underwriter's nondisclosure about its fees would have induced false beliefs in the alleged victim. *Id.* at 665-667.

Petitioner also relies on *United States* v. *Brown*, 79 F.3d 1550 (11th Cir. 1996), where the court reversed mail fraud convictions that rested on the defendants' sales of houses without disclosing that the houses cost more than comparable homes sold by competitors in the area. The court did observe in *Brown* that the defendants and their customers were entering into an arm's-length transaction, and that they were not in a legal relationship that would have required the defendants "to disclose pricing structures under every circumstance." *Id.* at 1557. But the court also noted that "it can be criminal fraud for a seller to conceal, or even sometimes fail to disclose, information after already affirmatively misleading customers about material facts." *Id.* at 1558. Moreover, the principal basis of the court's decision in *Brown* was its conclusion that a person of ordinary prudence would not have relied on the pricing representations made by the defendants alone, but would have conducted an independent examination of comparative house prices, since those prices were readily available to the buyers. *Id.* at 1558-1559.

We disagree with that holding in *Brown*, but nonetheless it does not aid petitioner here. *Brown* does not hold that a mail fraud conviction must be reversed when the defendant omits to disclose certain information *and* that information could not be readily discovered by a reasonably prudent person. To the contrary, the *Brown* court expressly distinguished "sale of distant property" cases, "where the purchaser has no chance to investigate the property's condition and value." 79 F.3d at 1560. That principle applies here. Petitioner's customers could not have readily discovered the fact of his criminal conviction and the injunction against his selling securities, and his failure to disclose those facts was an important part of his scheme to defraud customers into purchasing worthless LLC interests.

Petitioner argues further (Pet. 17-19) that the rule of lenity and the notice component of due process require reversal of his convictions because he had no notice that his failure to disclose his criminal record would later support a fraud charge. But, as we already have shown, the case law has long held that the mail and wire fraud statutes reach beyond common law fraud, and in particular may reach omissions even in the absence of a fiduciary or regulatory duty to disclose. That the prohibition against deceptive omissions may turn on the facts of the case does not mean that petitioner lacked notice of his obligation to reveal important information that would have motivated his customers' investment decisions, namely his criminal record and the prohibitory injunction entered against him.

Finally, petitioner's claim that the *Chiarella* rule applies to the mail and wire fraud statutes does not warrant review in this case, since it is highly unlikely that petitioner would benefit from application of that

rule. The indictment in this case charged that petitioner's fraudulent schemes involved not just the failure to disclose his criminal conviction and the civil injunction against him, but also false and misleading statements and material omissions of fact made with regard to matters such as the true identity of the principals involved in his investment schemes, the uses of the proceeds, the profits to be made, and the ability of investors to participate in management decisions. See Pet. C.A. App. A45, A49, A52, A69-A70. The concealment allegations that petitioner challenges were only the last of several charged components of the schemes.

The trial court instructed the jury that the charged schemes included both false statements about the details of the venture, such as the use to be made of the investors' money, and the failure to disclose material facts about the investment and petitioner and others involved in the ventures. See Pet. C.A. App. A1474.[2]

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[2] The court instructed the jury (Pet. C.A. App. A1474):

> Count 1 charges that the alleged fraud included (a) false statements about details of the ventures, such as the use to be made of the investors' money, the claimed subscribership for the wireless cable services, the manner in which the entities owning the investments would be operated and the profits to be made from the investment and (b) the failure to disclose to the investors material facts about the investment and about the defendant and others involved in the ventures.
>
> * * * * *
>
> Count 15 charges that the alleged fraud included (a) false statements about details of the ventures, such as the use to be made of the investors' money, the manner in which the entities owning the investment would be operated and the profits to be made from the investment and (b) the

The court also instructed the jury that while it was not required to find that every charged component of the scheme was proved, it did have to find that "the scheme, substantially as charged, was set up." *Id.* at A1478. In light of those instructions, the jury's verdict means that it found that the scheme, "substantially as charged," was set up. There is no reasonable possibility that the verdict would have been different if the single charge of concealment of petitioner's convictions and the civil injunction had not been included in the indictment. Accordingly, this would not be an appropriate case in which to determine whether the concealment of prior convictions and a civil injunction, standing alone, could support a mail fraud conviction.[3]

2. Petitioner also contends (Pet. 19-22) that the trial court should have admitted tape-recorded excerpts of statements by two witnesses even though the witnesses admitted making the statements after reading transcripts of the recordings and hearing the crucial portions of those transcripts read in the presence of the jury. Because the court of appeals affirmed by judgment order, it is not possible to determine whether the court disagreed with petitioner's contention that the recordings should have been played for the jury, or

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failure to disclose to the investors material facts about the investment and about the defendant and others involved in the ventures.

[3] Petitioner's reliance (Pet. 12) on *Yates* v. *United States*, 354 U.S. 298 (1957), is misplaced. *Yates* requires reversal only when the jury's verdict may have rested on a legally invalid ground, and "it is impossible to tell which ground the jury selected." *Id.* at 312. In this case, the instructions did not permit the jury to select only one charged misstatement or omission and convict on that basis, but required a finding that the scheme was set up "substantially as charged."

whether it concluded that any error was harmless; because of that uncertainty, this case is not an appropriate vehicle for resolution of petitioner's contention. In any event, the trial court committed no reversible error in excluding the tape recording.

Petitioner argues that the district court's ruling was contrary to *Gordon* v. *United States*, 344 U.S. 414 (1953). *Gordon*, however, involved the quite different situation where the testifying witness admitted that he had made prior inconsistent statements about the defendant's culpability, and where the trial court denied the defendant's request that the government produce those statements. See *id.* at 416. In this case, by contrast, the prior inconsistent statements were not only produced but were read aloud to the jury. Thus, although the Court in *Gordon* suggested that, because of the "best evidence" rule, the testifying witness's acknowledgment of the contradiction between his live testimony and his prior statement was not sufficient to exclude the prior statement itself from evidence (see *id.* at 420-421), the Court was not addressing a situation like this one, where the crucial portions of the transcript of the recording were read aloud to the witness in the presence of the jury, and the trial court concluded that admission of the recording itself would be merely cumulative evidence on the same point. And lower courts have concluded that, when a witness is shown a prior inconsistent statement and admits making the statement, the witness is thereby impeached and no further proof is necessary. See *United States* v. *Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); *United States* v. *Jones*, 578 F.2d 1332, 1340 (10th Cir.), cert. denied, 439 U.S. 913 (1978); *United States* v. *Roger*, 465 F.2d 996, 997 (5th Cir.), cert. denied, 409 U.S. 1047 (1972); *United States* v. *Hibler*, 463 F.2d 455, 462 (9th Cir.

1972); cf. Fed. R. Evid. 1007 ("Contents of * * * recordings * * * may be proved by the testimony * * * of the party against whom offered * * * without accounting for the nonproduction of the original.").

Petitioner relies also on the decisions of three courts of appeals, *United States* v. *Strother*, 49 F.3d 869, 874 (2d Cir. 1995); *United States* v. *Lashmett*, 965 F.2d 179, 181-182 (7th Cir. 1992); and *Williams* v. *United States*, 403 F.2d 176, 179 (D.C. Cir. 1968). Those cases, however, do not adopt a per se rule that, when a witness acknowledges making a prior inconsistent statement, the original of that statement must always be provided for the jury. In *Strother*, the defendant sought to introduce prior statements that differed from the witness' testimony at trial and were crucial to the defendant's defense, because, contrary to the government's assertion, the written statements suggested that the defendant had not asked the witness to pay a check (for which he did not have sufficient funds) rather than to hold it until he had the requisite funds in his account. 49 F.3d at 874-875. The court concluded that, in the circumstances, cross-examination of the witness as to the documents did not render harmless the failure to admit them into evidence. *Id.* at 876. But that holding reflected a determination about the effect of the exclusion of the documents on the facts of the particular case; it did not establish a blanket rule that a prior inconsistent statement always should be admitted when a witness admits making the statement. The court indeed emphasized that, "[b]ecause of the exclusion of the [documents], [the defendant] was restricted from effectively presenting his defense," *ibid.* The same cannot be said of this case, where the trial court specifically found that defense counsel had effectively cross-

examined the Herrs on their supposed plans to lie at trial.

In *Lashmett*, the defendant sought to admit the complaint and affidavits from a civil case that two witnesses had filed. In their testimony at the defendant's fraud trial, the witnesses said that the complaint was false and was part of the fraudulent scheme. The court of appeals held that the complaint should have been admitted, 965 F.2d at 181-182, but it also found that the error was harmless in that case, because the jury was fully apprised of the witnesses' hoax and deceitfulness, *id.* at 182-183. Moreover, in *Lashmett*, the district court cut off all questioning about the contents of the complaint and affidavits, because the witnesses testified on the stand that they had made false statements in those documents; the district court viewed the documents as prior *consistent* statements and therefore inadmissible hearsay. *Id.* at 181.

In *Williams*, the trial court refused to admit into evidence a written statement made to the police by a testifying witness; on cross-examination, the defense counsel provided the statement to the witness, and after the witness read the statement, he changed his testimony. 403 F.2d at 178. Relying on *Gordon*, the court of appeals concluded that the trial court's exclusion of the statement was error, *id.* at 179, although it also found that the error was harmless in part because the "basic fact of an inconsistency between his initial testimony and a prior statement which he admitted signing became known to the jury," *ibid.* In *Williams*, unlike this case, the statement was not read aloud in the courtroom; the jury did not know the contents of the prior statement, and therefore could not judge the extent to which it contradicted the witness's testimony. In this case, by contrast the jury heard the contents of

the prior statements made by the Herrs and therefore had adequate means with which to determine those witnesses' credibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER MILTON SONNEBERG'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MILTON SONNEBERG,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Milton Sonneberg's Reply to Breief For the United States In Opposition To His Petition For A writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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Milton Sonneberg is incarcerated, his freedom deprived on the basis of an invalid theory of criminal liability. Yet the

government argues that this case "would not be an appropriate vehicle" to resolve the applicability of this untenable theory. (U.S. Br. 6). The government maintains this position in the face of the federal courts' apparent need for guidance from this Court, as reflected by a conflict in the circuits and recent decisions by district courts that do not comport with the government's view of the state of the law. The last statement by this Court on the issue raised by this case strongly suggests that petitioner's conviction cannot stand. The government's formulation of the applicable legal standard has never been endorsed by this Court. If, in fact, "[t]he case law has long held that the mail and wire fraud statutes reach beyond common law fraud, and in particular, may reach omissions even in the absence of a fiduciary or regulatory duty to disclose" (U.S. Br. 10), this Court has not so stated.

1. The government opposes the petition, arguing that the requirement of a duty to disclose that is found in *Chiarella v. United States*, 445 U.S. 222 (1980), is inapplicable to the mail and wire fraud statutes because they "are not limited to matters that would be punishable as common law fraud." (U.S. Br. 7). Whether this may be true in certain circumstances, the cases upon which the Solicitor General relies have little to do with the issue presented in this Petition. *See Durland v. United States*, 161 U.S. 306 (1896); *United States v. Moore*, 37 F.3d 169 (5th Cir. 1994); *United States v. Stewart*, 872 F.2d 957 (10th Cir. 1989); *United States v. Bishop*, 825 F.2d 1278 (8th Cir. 1987). Those cases simply recognize that where the common law has been preempted by Congress, the legislative intent controls. But here, where there is no indication that Congress intended for the mail and wire fraud statutes to encompass mere nondisclosures, the common law remains instructive. *See United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996) (recognizing that "long-established common-

law fraud concepts inform -- but do not control -- our discussion. . .especially in light of the requirement that federal criminal statutes be interpreted narrowly . . ."). Accordingly, as *Brown*, and *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) recognize, the fact that *Chiarella* sounds in the common law is irrelevant. *Chiarella* remains compelling precedent for this Court's construction of the mail and wire fraud statutes. *See also United States v Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (applying *Chiarella*'s duty to disclose requirement to false statements under 18 U.S.C. §1001); *United States v. Irwin,* 654 F.2d 671, 678-79 (10th Cir. 1981) (same).

In support of its proposition that the mail fraud statute is "broader" than the common law and encompasses mere omissions, the government cites several cases that purport to uphold the imposition of criminal liability for nondisclosure. In each of these cases, however, the omission that was held to be criminally fraudulent was accompanied by either (1) a misleading half-truth, (2) an affirmative concealment of the truth, or (3) the presence of a fiduciary-type relationship. In not one of these cases was the defendant convicted merely for failing to disclose information, as Petitioner was in this case.

In *United States v. Riebold*, 135 F.3d 1226 (8th Cir), *cert. denied*, 118 S.Ct. 2356 (1998), the court of appeals found that the defendant had affirmatively *concealed* his criminal past by denying that he had ever been to prison (he had in fact been sentenced to serve five years), and told a *misleading half-truth* when he represented that he had only one fraud conviction (he had two). Thus, Riebold was not convicted for his mere failure to disclose his prior convictions; rather, he was convicted for deliberately lying and misleading investors who asked about his past. Moreover, Riebold stood in a much

different relationship with the investors than Petitioner: investors entrusted their money *with* Riebold, and relied on *his* discretion, honesty, integrity and business acumen. No investor in this case similarly entrusted Petitioner; they knew that he was a mere salesman and just a conduit to their ultimate investment. The other cases relied on by the government are similarly distinguishable. *United States v. Moore*, 37 F.3d. 169 (5th Cir. 1994) (defendants sold land and conveyed a deed *misrepresenting* good and clear title when in fact an outstanding mortgage was held on the property); *United States v. Keplinger*, 776 F.2d 678, 698 (7th Cir. 1985) (defendant research company submitted fraudulent report to the FDA which *concealed* test results that revealed that its drug had harmful side-effects). In fact, the only cases cited by the government that deal with individuals who were convicted merely for omitting to disclose certain information resulted in the convictions being reversed.[1] *Chiarella v. United States*, 445 U.S. 222 (1980); *United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997); *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996).

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[1] Nothing in *Riebold*, *Moore*, and *Keplinger* affects Petitioner's argument that the rule of lenity and his due process rights were violated. Those cases involved only affirmative misrepresentations and active concealments of the truth. Therefore, they could not have provided notice to Petitioner that his failure to disclose would be criminal. Moreover, the Solicitor General has failed to address Petitioner's due process argument that under the securities law statutes, individuals such as Petitioner were not obligated to disclose their prior criminal activity. *See* 17 C.F.R. § 229.401(f); Schedule 14A, 17 C.F.R. § 240.14a-101.

The government contends that there is no split in the circuits on this issue, as neither *Brown* nor *Cochran* have adopted *Chiarella*'s holding that there can be no criminal liability for a failure to disclose "absent a duty to speak." Even if this were true, it would be immaterial. The importance of this issue to the entire federal criminal system is such that even in the absence of a split, this Court should grant certiorari in order to settle this vital issue of law. Sup. Ct. R. 10(c). Moreover, the Third Circuit's affirmance of Petitioner's conviction violates the holding and the spirit of *Chiarella*. Sup. Ct. R. 10(c).

But this case raises an issue on which there is a split in the circuits. Contrary to the Solicitor General's view, there can be little question that *Brown* and *Cochran* dealt with individuals, such as Petitioner, who were under no duty to reveal information to their "victims," but nonetheless were convicted for failing to disclose. The convictions in *Brown* and *Cochran* were overturned because the Tenth and Eleventh Circuits, relying on *Chiarella*, found that a conviction for nondisclosure could not stand absent a duty to disclose. Despite the Solicitor General's claim to the contrary, there can be no doubt that the *Cochran* panel held the government to *Chiarella*'s standard, as the opinion focused on the absence of a duty to disclose. After noting that no "statute, regulation, common law or contractual provision" created such a duty, the Court then looked to *Chiarella* to see if the relationship between *Cochran* and the alleged victim gave rise to a duty to disclose. *Cochran*, 109 F.3d at 665 ("While a fiduciary relationship is not an essential element of a wire fraud prosecution, it can trigger a duty of disclosure as can some other relationship of trust and confidence between the parties") (citing *Chiarella*, 445 U.S. at 228). Ultimately, of course, *Cochran* found that no such relationship existed. *Id.*

The Solicitor General similarly attempts to distinguish *Brown*, claiming that the court reversed defendants' convictions only because there was no evidence that the misrepresentations at issue were material. But there, the Eleventh Circuit only considered the issue of materiality of the defendants' *misrepresentations* after determining that absent a duty to disclose, the conviction could not stand on omissions alone. *Brown*, 79 F.3d at 1558. The government's attempt to distinguish *Brown* -- because, unlike this case, the undisclosed information could "readily" be discovered by a prudent person -- is belied by the record. (U.S. Br. 10). Any of the investors in this case could have simply asked Petitioner about his past, or done some basic research. But as the record shows, no investor ever asked Petitioner, who was after all only a salesman, about his past.[2]

Finally, the Solicitor General argues that, even if *Chiarella* does apply to the mail and wire fraud statutes, certiorari is still not warranted here because the indictment also charged that Petitioner made other false and misleading statements that *could* have formed the basis for his conviction. This argument turns this Court's decisions in *Yates v. United States*, 354 U.S. 298 (1957), and *Griffin v. United States*, 502 U.S. 46 (1991), on their heads. Whether there was an alternative legal theory upon

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[2] The Solicitor General intimates that Petitioner's occasional use of the name Sonny Hill somehow mislead investors into believing that he did not have a criminal past. But the record clearly shows that this was not the case, Petitioner only sporadically used the name Sonny Hill during the time that he was selling the wireless deals that formed the first half of the indictment, and not at all when he was selling L.L.C. interests in the radio stations described in the indictment's second half.

which the government's prosecution could have been based is irrelevant. The fact remains that it is "impossible to tell" if the jury convicted Petitioner on the deficient legal theory; accordingly, reversal is required. Even a cursory review of the record indicates that Petitioner's failure to disclose to investors his prior conviction formed the backbone of the government's case. It was prominently featured in the indictment, repeated incessantly during opening statements, formed an important part of nearly every direct examination, and was the central theme of the government's closing argument and rebuttal. It was even highlighted by the District Court as a viable theory of prosecution during its supplemental charge to the jury. For the Solicitor General to now suggest that there is "no reasonable possibility" that the jury in this case convicted Petitioner for failing to disclose his prior conviction, simply ignores how the government and the trial judge presented this case to the jury.[3]

2. The Solicitor General also argues that no error was committed by the district court in forbidding the defendant to play for the jury excerpts of tape-recorded prior inconsistent statements of the government's star witnesses. Although the government acknowledges that there is a split in the Courts of Appeals concerning whether evidence of a prior inconsistent

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[3] The Solicitor General's argument that the Court's instruction that the scheme to defraud must be proved "substantially as charged" is a meaningless one. The prosecution ensured that the jury viewed Petitioner's failure to disclose as the essence of the crime charged in the indictment. To follow the Solicitor General's suggestion that the District Court's use of "substantially as charged" language in its instructions somehow ameliorated the fact that the government and court presented this case to the jury as a nondisclosure case would render *Yates* meaningless.

statement may be admitted into evidence after the witness admits making the statement, it nonetheless argues that review is not warranted in this case. It argues that the Petitioner was not prejudiced because his lawyer was able to read from the transcripts of the tapes during cross-examination of the witnesses. This ignores, however, the fact that upon acknowledging making the statements contained on the tapes, the witnesses immediately downplayed their significance by saying that they were only "joking" and that the statements were made "in jest." In these circumstances, forbidding the defendant to present the best evidence of these powerfully exculpatory statements violated the principles of *Gordon v. United States*, 344 U.S. 414 (1953), and requires review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

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Respectfully submitted,

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